

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RAFIQ J. SALIM,

Plaintiff,

v.

DECISION AND ORDER
15-CV-418-A

COUNTY OF ERIE, et al.,

Defendants.

This case was referred to Magistrate Judge H. Kenneth Schroeder, Jr., pursuant to 28 U.S.C. § 636(b)(1) for the conduct of pretrial proceedings. On August 31, 2017, Magistrate Judge Schroeder filed a Report and Recommendation (Dkt. No. 22) addressing the Defendants' motions to dismiss Plaintiff Rafiq J. Salim's complaint (Dkt. Nos. 2, 10, 11 and 13). Magistrate Judge Schroeder recommends that Defendants' motions be granted.

The Court has carefully reviewed the Report and Recommendation, the record in this case, and no objections to the Report and Recommendation having been timely filed, it is hereby

ORDERED, pursuant to 28 U.S.C. § 636(b)(1), the Court adopts the Report and Recommendation except to the extent that it recommends dismissal of claims against the State of New York be with prejudice. As the Magistrate Judge recommends, those claims are barred by the State's immunity, and are therefore beyond the Court's subject matter jurisdiction and must be dismissed. But a dismissal for lack of subject

matter jurisdiction is because the Court lacks the power to hear a claim, and is necessarily without prejudice. *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999). Otherwise, the Defendants' motions to dismiss Plaintiff's complaint are granted for the reasons stated in the Report and Recommendation as follows: 1) the motions to dismiss the Cheektowaga Police Department (Dkt. No. 2), and the Buffalo Police Department (Dkt. No. 10) for failure to state a claim are granted with prejudice; 2) the motion to dismiss of Cheektowaga Police Officer Robert Joyce (Dkt. No. 2) is granted with prejudice with respect to Plaintiff's false arrest, unlawful imprisonment, due process and unlawful seizure claims, and with respect to Plaintiff's malicious prosecution claim (Dkt. No. 2) without prejudice if, but only if, the underlying criminal charges are resolved in Plaintiff's favor; and 3) granted as against all remaining Defendants for lack of personal jurisdiction, without prejudice to one final opportunity to complete personal service as described below.

Plaintiff Salim shall have 35 days from the date of this Decision and Order to attempt to effect proper service of the summons and complaint upon remaining Defendants, and he is hereby **ORDERED** to file proof of service or waiver of service in the docket within 45 days of that date.

Plaintiff Salim is further **ORDERED** to file a statement made under oath or penalty of perjury summarizing the status of a criminal proceeding underlying his false arrest claim against Cheektowaga Police Officer Robert Joyce within 45 days from the date of this Decision and Order. The Court hereby notifies the parties pursuant to Fed. R. Civ. P. 56(f)(3) that it will consider granting summary judgment in favor of

Defendant Joyce if those criminal proceedings were not resolved in Plaintiff's favor.

The Clerk shall enter Judgment in favor of Defendants Buffalo Police Department, Cheektowaga Police Department, and shall terminate them from the caption of the case. The Clerk shall also terminate the State of New York. The action is recommitted to Magistrate Judge Schroeder for further proceedings.

IT IS SO ORDERED.

Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: January 18, 2018